PETITION FOR REHEARING

(Filed April 15, 1933)

IN THE

United States Circuit Court of Appeals

SIXTH CIRCUIT

No. 6126

CITY OF NORWALK, OHIO,
Defendant-Appellant,

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,
Plaintiff-Appellee.

Petition for Rehearing

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Plaintiff-Appellee.

PETITION FOR REHEARING

TO THE HONORABLE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH JUDICIAL CIRCUIT:

Now comes plaintiff-appellee in the above entitled cause and presents this, its Petition for Rehearing of the above entitled cause, and in support thereof respectfully shows:

I.

THE DECISION OF THE COURT IS PLACED UPON A POINT HERETOFORE NOT STRESSED AND NOT FULLY BRIEFED OR ARGUED.

The court has ordered the dismissal of Appellee's Bill of Complaint on the ground that any effective in-

junction in this case is within the prohibition of Section 265 of the Judicial Code (U. S. C., Title 28, Section 379). Although one of appellant's assignments of error (No. 24, R. 350) referred to this section, it did not make this claim. Appellant's objection (as shown by its brief, p. 177) was strictly limited to the claim that the injunction violated the statute because it was directed to the state court, which by its terms it was not, as was shown in appellee's brief pages 150-152; and in so far as the injunction was addressed to appellant and its representatives, appellant did not question its propriety. The matter was not mentioned in the supplemental briefs filed by either party and the question was not presented to the trial court by appellant, either by way of answer or brief. The question was not even mentioned in oral argument before this Court.

It is appellant's position that due consideration of all of the authorities construing Section 265 will show that this section does not prohibit the relief granted by the District Court, and for that reason appellee petitions for a rehearing of the cause so that this issue may be fully and completely presented to this Court.

II.

THE DECISION OF THIS COURT APPEARS TO BE BASED UPON A MISCONSCTRUCTION OF THE DECREE OF THE DISTRICT COURT.

The final decree of the District Court enjoins the "* * * City of Norwalk, Ohio, its attorneys, officers, offi-

cials, agents, employes and representatives, and all persons whomsoever to whom notice of this Order shall come, * * *"; among other important things, "* * * from taking any steps or action of any kind whatever to cause the enforcement or carrying out by the Sheriff of Huron County, Ohio, or any of his deputies, or by any other officers of any of the courts in the State of Ohio of the judgment of ouster entered by the Court of Appeals of Huron County, Ohio * * *", (R. 241, 242) in the quo warranto case. As we read the opinion of this Court (paragraph 3), this Court regards the decree as operating directly upon the Court of Appeals of Huron County and its officers. Possibly this results from the palpably erroneous statement of appellant in its principal brief (p. 177) as to the substance of the decree. Plainly by the language of the decree, it is not directed to the state court. Appellee does not contend and never has contended that this decree operates directly upon the State Court of Appeals. See appellee's principal brief, page 151. Appellee fully recognizes that the decree can have no such application and contends merely that the decree is operative against appellant, its attorneys, officers and representatives. If this Court regards the language used as going beyond this, appellee respectfully submits that the decree can be modified, (as suggested in appellant's brief p. 178) or the case remanded to the district court with instruction to modify the language, so as to remove any doubt as to its extent, which does not require a dismissal of the action, but rather

that thereupon the district court decision shall stand affirmed. No suggestion has ever been made that the injunction in its other important phases operates upon the State Court.

III.

THE INJUNCTIVE RELIEF GRANTED BY THE DISTRICT COURT IS NOT PROHIBITED BY JUDICIAL CODE SECTION 265—THE INJUNCTION IS NOT ONE AGAINST PROCEEDINGS IN THE STATE COURT.

Briefly stated, the situation involved is: the quo waranto action was instituted and carried on in the Court of Appeals of Huron County at the instance and expense of the City of Norwalk, with the mortgagor, the Ohio Electric Power Company, being made party defendant. Neither the mortgagee, appellee here, nor any of the bond-holders under the mortgage were made parties to the quo warranto action or served with process or notice of any kind, or represented in that suit, as shown by the bill of complaint herein (R. 13) and admitted by the answer herein (R. 43). The Court of Appeals proceeded to render a decree ousting the mortgagor from the streets and public places of the City of Norwalk. The enforcement of this decree will entirely destroy the value of the property located in the City and consequently wipe out all that portion of appellee's security. In order to prevent this, as well as imminently threatened acts of the City independently of attempts

by the City to make use of the State Court decree, appellee brought its action in the District Court, and after due hearing the District Court enjoined the City, among other things, from taking any steps whatsoever to cause the enforcement of the decree of the Court of Appeals, the injunction running only against the City and its representatives and not against the Court itself.

Appellee submits that upon these facts the District Court was entirely justified in entering the decree enjoining the City, and that its action is not prohibited by Judicial Code, Section 265.

The injunction is not against proceedings in the state court action, but denies to appellant unconscionable use of that judgment and comes after all proceedings in the state court have ended. The Supreme Court has very clearly and definitely held that Section 265 has no application after the termination of the proceedings in the State Court, when the plaintiff seeks only to prevent enforcement of the judgment there involved. *Simon v. Southern Railway*, (1915) 236 U. S. 115:

> "But when the litigation has ended and a final judgment has been obtained—and when the plaintiff endeavors to use such judgment—a new state of facts, not within the language of the statute may arise." (p. 124)

See also

Essanay Film Co. v. Kane, (1922) 258 U. S. 358, at p. 360.

It is entirely true, as stated in the opinion in the Simon case, that these cases do not mean that without more than a showing of federal jurisdiction an injunction may issue. A proper equitable basis must be shown. The point is, that in a proper case the Federal Court may issue its injunction regardless of Section 265. In other words, a federal court has the same power to enjoin the inequitable use of a judgment of a state court as any other state court would have.

Simon v. Southern Railway, supra:

> "But, manifestly, if a new and independent suit could have been brought in a state court to enjoin Simon from enforcing this judgment, a like new and independent suit could have been brought for a like purpose in a Federal court, which was then bound to act within its jurisdiction and afford redress (Hyde v. Stone, 20 How. 175; Reagan v. Farmers' Trust Co., 154 U. S. 391; Payne v. Hook, 7 Wall. 429)." (P. 123)

Union Ry. Co. v. Illinois Cent. R. Co., (C. C. A. 6, 1913) 207 Fed., 745:

> "We set aside as without merit the contention that the decree complained of violates section 265 of the Judicial Code (formerly section 720 of the Rev. Stat. (U. S. Comp. St. 1901, p. 581)), which forbids, except in the single case there stated, the granting of injunction by any court of the United States to stay proceedings in any court of a state. The decree does not act upon the state court, nor does it in terms forbid action in that court. It

in effect seeks to prevent appellant from obtaining the benefit of a judgment claimed to be inequitable. The existing diversity of citizenship between the parties gave to the federal court precisely the same jurisdiction as vested in a court of equity of the state of Tennessee. In other words, appellee is entitled in the federal courts to the relief obtainable in the state court, but to no greater relief." (p. 747).

The state courts of Ohio, of course, exercise this jurisdiction. See *Anderson v. Anderson,* 8 O. 108, enjoining the enforcement of a foreign judgment; *Wood v. Stanberry,* 21 O. S. 142, enjoining execution under a void judgment; and *Place v. Sweetzer,* 16 O., 142, enjoining enforcement of judgment against property of one not a party to the action.

We respectfully submit that upon the basis of the foregoing authorities, appellee is entitled to the relief given in the district court and that the case of *Louisville Trust Company v. Cincinnati,* (C. C. A. 6-1896) 76 F. 296, upon analysis and when considered with the decisions by this court, discussed infra, does not support the conclusion that the injunction in this case violates Section 265. This court alludes to the language at page 317 of the opinion, which, casually read, might seem to indicate that it is proper to enjoin the defendant only from taking into his own hands the enforcement of the state court decree. However, it must be observed that there the state court had not actually ordered the

removal or destruction of the property in question and the plaintiff was not claiming that the city intended to act to enforce the state court decree, so that it was unnecessary for the court to pass upon the question presented in the instant case. It also appeared that the question involved was not before the court there since the property in question was then in the possession of a federal court receiver. Hence any language to the effect that it would have been improper to have enjoined the City in that case from applying for any writ which the state court might lawfully issue, as being a violation of Section 265, must not be given any greater effect than the actual circumstances then before the court would warrant. Obviously such language would not have been used by this court had the situation been presented to it after a judgment in the state court definitely directing the removal or destruction of the property.

It is also pertinent that this case was decided in 1896, long before the Simon case and other recent decisions of the Supreme Court making it clear that Section 265 has no application in a proper case after the prior case has proceeded to a judgment, the enforcement of which is sought to be enjoined. Hence what was said at page 317 in the opinion of the Louisville case must be regarded as modified and limited by the later decisions of the Supreme Court and this court.

We respectfully submit that as the decision of reversal by this court is rested upon the basis that the injunction violates Section 265, it is clearly in conflict

with the foregoing decisions, and that such position is untenable.

IV.

THIS COURT ERRED IN FINDING THAT THIS CASE LACKS THE CONDITIONS ESSENTIAL TO THE EXERCISE BY A FEDERAL COURT OF ITS POWER TO RESTRAIN THE ENFORCEMENT OF THE STATE COURT JUDGMENT.

This court says that one of the following essential conditions must be present to justify the federal court in restraining enforcement of the state court decree, namely:

1. The necessity of protecting federal court jurisdiction properly acquired and subsisting.

2. The state court decree must be void for lack of jurisdiction.

3. Fraud, mistake or accident.

4. Denial of notice and opportunity to be heard; coupled with a showing that there has been no fault or negligence upon the part of the federal court plaintiff, which is interpreted to mean that the federal court plaintiff must show that it had no knowledge of the state court proceedings until after judgment, or could not have appeared in those proceedings and asserted its defenses.

We respectfully submit that the position of this court overlooks certain vital considerations which render the decision erroneous, viz.:

1. The bases for action by the federal court as recited by this court are not exclusive.

2. This case qualifies under the second and fourth bases or conditions laid down by this court, as stated above—the enforcement of the quo warranto decree will result in the taking of the property of this appellee without due process of law, which is always a ground for injunction by the federal courts against the enforcement of a state court judgment.

3. Want of due process by failure to serve or make appellee a party is not cured by any extra-judicial or casual notice.

4. The cases cited in the court's opinion do not hold that absence of fault or negligence as interpreted by this court must be shown by the federal court plaintiff.

5. In any view of the case appellee is without fault because under the quo warranto statutes it could not have intervened to assert its rights in the quo warranto suit.

6. We submit that the decision of this court in this case is contrary not only to its own prior decisions, but is contrary to the decisions of other circuits and to those of the United States Supreme Court.

We now undertake to demonstrate the vital considerations overlooked by this court.

1.

The Bases for Action by the Federal Court as Recited by This Court Are Not Exclusive.

In *Wells Fargo & Co. v. Taylor,* (1920) 254 U. S. 175, the Supreme Court sets forth three classes of cases in which the federal courts have acted to enjoin inequitable use of state court judgments. The third class, which covers the case at bar, was thus broadly stated:

> "In recognition of this it has come to be settled by repeated decisions and in actual practice that, where the elements of federal and equity jurisdiction are present, the *provision does not • • • prevent them from depriving a party, by means of an injunction of the benefit of a judgment obtained in a state court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience.*" (p. 183) (Italics ours)

There is nothing in this statement by the Supreme Court limiting relief to the specific classes of cases named by this court in its opinion. In the various cases alluding, for example, to accident, fraud or mistake as a ground for relief, the reasonable interpretation is that the court had no intention of placing a limitation on the power, but that the emphasis on a specific ground of relief in any of the cases is merely for the purpose of showing the particular ground applying to that case coming within the broad proposition quoted above from the Wells-Fargo case. See Michigan Law Review for

June, 1932, Federal Injunction Against Proceedings in State Courts; the Life History of a Statute, by Professor Durfee of the University of Michigan Law School, page 1157, footnote 38, discussing the Simon case.

The authorities discussed subsequently in this Petition demonstrate that no such rigid limitation is applied as would be indicated by the opinion of this court in this case.

2.

This Case Qualifies Under the Second and Fourth Bases or Conditions Laid Down by This Court, as Stated Above—the Enforcement of the Quo Warranto Decree Will Result in the Taking of the Property of This Appellee Without Due Process of Law Which is Always a Ground for Injunction by the Federal Court Against the enforcement of a State Court Judgment.

It is well settled that the enforcement of a void judgment should be restrained regardless of Section 265. This principle has been recognized by this Court, not only in the opinion in this case where it is not applied, but elsewhere. See *Ballard & Ballard Co. v. Munson,* (C. C. A. 6-1928) 25 Fed. (2d), 252, where it was applied. See also *Simon v. Southern Railway,* supra, and *Atchison Ry Co. v. Wells;* (1924) 265 U. S. 101.

Under the opinion of this Court, a distinction must be made in the application of this rule between a case where one is made party to the action, but not served, and the case where a mortgagee having a previously

acquired interest in property is not even made a party to an action affecting that property. This opinion says the judgment against the named but unserved defendant in the first case is void and relief will be given against it, but that the judgment against the mortgagor in the second case where the mortgagee is neither named as a party nor served, is conclusive and binding on the mortgagee. We respectfully submit that no such distinction exists and that the judgment rendered in the latter type of case is to all intents and purposes as void and inconclusive as to the mortgagee not made a party, as the judgment in the first example, and that the enforcement of such a judgment as against such mortgagee constitutes the taking of property without due process of law and is, therefore, an inequitable use of such a judgment, which the federal courts will enjoin the state court plaintiff from making. This point has been made clear by the Supreme Court in at least two decisions.

In *Simon v. Southern Railway*, supra, the court said:

> "For even where there has been process and service, if the court 'finds that the parties have been guilty of fraud in obtaining a judgment* * * it will deprive them of the benefit of it.' McDaniel v. Traylor, 196 U. S. 415, 423. *Much more so will equity enjoin parties from enforcing those obtained without service. For in such a case the person named as defendant 'can no more be regarded as a party than any other member of the community.'*" (p. 122) (Italics ours).

Postal Telegraph Cable Co. v. Newport, (Ken., 1918) 247 U. S., 464:

"The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. Windsor vs. McVeigh, 93 U. S. 274, 277; Louisville & Nashville R. R. Co. v. Schmidt, 177 U. S. 230, 236; Simon v. Craft, 182 U. S. 427, 436. And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard (Pennoyer v. Neff, 95 U. S. 714, 733; Scott v. McNeal, 154 U. S. 34, 46; Coe v. Armour Fertilizer Works, 237 U. S. 413, 423), *so it cannot without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.*" (p. 476) (Italics ours).

And see:

Essanay Film Co. v. Kane, supra:

"But when the litigation in the state court has come to an end and final judgment has been obtained, the question whether the successful party should in equity be debarred from enforcing the judgment, either because of his fraud *or for the want of due process of law in acquiring jurisdiction, is a different question, which may be passed upon by a federal court without the conflict which it was the purpose of the Act of* 1793 *to avoid.*" (p. 360). Italics ours).

These cases govern the present situation. Our case is the Simon case in essence. In the Simon case, Simon's judgment against the railway was void for lack of service of process. Here the quo warranto judgment is void in so far as it affects appellee's property rights for failure to make appellee a party to the action and then give it a day in court. That such is the effect where the mortgagee is not a party was recognized by this Court in *United Sheet & Tin Plate Co. v. Hess*, (C. C. A. 6-1908) 159 Fed., 889:

> "A decree upon either aspect of the case would be fruitless, unless the mortgagees would be thereby concluded. That they would not be, not being parties, is too plain to be discussed, Louisville Trust Company v. Cincinnati, 76 Fed., 296, 22 C. C. A., 334; Keokuk & Western Railroad Company v. Missouri, 152 U. S., 301; 14 Sup. Ct. 592, 38 L. Ed. 450." (P. 892).

It is well settled generally that a mortgagee is entitled to an injunction against the enforcement of any judgment rendered in a case to which he was not a party and which will destroy the value of his security. Specifically see the opinion of this court in the oft cited case of *Louisville Trust Co. v. Cincinnati*, supra, like the instant case in its essential features, where the first thing decided was:

> "There is nothing in the law of Ohio which in any way contravenes the right of a railway company to mortgage its street easements, or which

would prevent such easements from passing to a purchaser at foreclosure sale. *It therefore follows that the complainant under the mortgage mentioned has acquired the substantial right in the street easements of the mortgagor company, and cannot be deprived of this security by a proceeding directly impeaching their validity and duration without being made a party thereto.*" (p. 299) (Italics ours).

See also:

Winslow v. Troy Iron & Nail Factory, 1 Disney 229;
Dunham v. Isett, 15 Iowa 285;
Fletcher Cyc. on Corporations (Perm. Ed.) Section 3186;

and it is held generally that the owner of property may restrain the inequitable use of any judgment which will damage or destroy his property.

Arundell v. Phipps, 13 Vesey 95;
Breeden v. Lee, Fed. Cas. 1828;
Cropper v. Coburn, Fed. Cas. 3416.

3.

Want of Due Process by Failure to Serve or Make Appellee a Party is Not Cured by Any Extra-Judicial or Casual Notice.

It has been indicated in the opinion that in order to entitle appellee to relief upon the principle that there must be no fault or negligence on the part of the plain-

tiff seeking an injunction, it must be shown that appellee was without notice of the state court proceeding or could not have intervened therein to protect its rights. We respectfully submit that appellee is not required to make this showing. The courts have uniformly established the rule that due process is not satisfied by any chance extra-judicial notice that may come to one whose rights are being adjudicated in a pending action to which he is not a party served with process.

Coe v. Armour Fertilizer Works, (Fla., 1915) 237 U. S., 413:

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In Stuart v. Palmer, 74 N. Y. 183, 188, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court." (pp. 424, 425).

For this proposition see also: *Security Trust Co. v. Lexington,* 203 U. S. 323, 333; *Central of Georgia Ry. v. Wright,* 207 U. S. 127, 128; *Roller v. Holly,* 176 U. S.

398, 409; and *Louisville & Nashville R. R. v. Stock Yards Co.*, 212 U. S. 132, 144, where it was said:

> "The law itself must save the parties' rights, and not leave them to the discretion of the courts as such." (p. 144).

See also *Rutherford's Case* 72 Pa. St. 82; *Ry. Co. vs. Board of Commissioners*, 247 P. 162 (Mont.)

4.

The Cases Cited in This Court's Opinion Do Not Hold That Absence of Fault or Negligence as Interpreted by This Court Must be Shown by the Federal Court Plaintiff.

This court, in its opinion, has said that appellee is not entitled to relief unless it shows that it was without knowledge of the state court action until after judgment therein or was unable to enter into the state court proceeding and there protect its rights. Nevertheless, upon the point here directly presented it has been explicitly held by this court, by the courts of other circuits, and by the United States Supreme Court, that extra judicial notice of the pendency of the state court action or the existence of opportunity to defend therein does not defeat the right of the party not served to secure the injunctive relief of the federal court, and he who is entitled to assert his rights and protect his interests in federal court because of diverse citizenship or otherwise is not required to go into state court to take this action.

The dominant and classic authority is the case of *Old Colony Trust Co. v. Omaha*, 230 U. S. 100. In view of the fact that this court in its opinion says that the Old Colony case does not hold that the federal court plaintiff can have relief by injunction without a showing of one of the bases recited by this court, such as accident, fraud, etc., and further, because this court assumes that some such basis must have been present in that case, we have been at pains to procure and comb the record in the Old Colony case. In the appendix to this Petition will be found copies of excerpts from the Bill of Complaint of the Trustee and the Answer of the City in that case, in so far as those pleadings have any bearing upon the question here at issue. There is no evidence in the Old Colony record contrary to the allegations of the Bill on this point. The Old Colony case is like the case at bar in every essential characteristic. In that case in the prior suit which was brought by the utility, the mortgagor, against the city in federal court, the city had obtained a final judgment dismissing the bill, which upheld the ordinance the enforcement of which would cut away the rights of the Trustee, which judgment had been affirmed by the Circuit Court of Appeals and the case was pending upon appeal by the utility company to the United States Supreme Court, when the suit was brought by the Trustee for an injunction against the enforcement of the ordinance. Hence the suit was one to enjoin the City from making an unconscionable use of the prior judgment. The trustee's Bill of Complaint

alleged the foregoing facts; that important considerations in support of its rights were not presented in the prior suit; that its mortgagor possessed perpetual rights in the streets; that the Trustee was not a party to the prior cause, and that in the then present state of the litigation it was impossible for it to intervene in the prior cause. The parallel between that case and the instant case will at once appear, and the record in the Old Colony case will be searched in vain for any proof or showing that the Trustee did not at all times know of the pendency of the prior suit, or that it could not have intervened therein before the case reached the stage of final judgment and appeal thereon to the United States Supreme Court, yet the Federal Court granted the Trustee an injunction.

As to the allegation in the Bill that the Trustee could not intervene in the then present state of the litigation when the case was pending on appeal to the United States Supreme Court, obviously the same fact appears in the case at bar, because as shown by the record, the instant suit was brought after the final judgment in the State Court in the prior suit and at a time when the only thing which could have been done by the Mortgagor was to petition for a review by the United States Supreme Court. In the Old Colony case the same contention was made by the City as the City of Norwalk makes here, namely, that every consideration which was before the court in the second suit had been presented in the prior suit. Upon that state of facts the holding

of the United States Supreme Court was set forth in the following language at page 122 of the opinion:

> "A prior suit by the Electric Company against the City, largely but not entirely like the present, resulted in a decree against the Electric Company. The City now takes the position that that decree is conclusive upon the Trust Company as mortgagee. But the law is otherwise. The Trust Company's rights, and those of the bondholders whom it represents, were not acquired during or since that suit but long prior thereto, and the Trust Company was not a party to it. This being so, the Trust Company is free to maintain the present suit, unembarrassed by the decree in the other. Keokuk & Western Railroad Co. v. Missouri, 152 U. S. 301, 313; Louisville Trust Co. v. Cincinnati, 76 Fed. Rep. 296."

If it be suggested that the principle invoked by this court in the instant case was not brought to the attention of the court in the Old Colony case, the record there shows otherwise. The defendant, City of Omaha, not just once, but at least nine times in the course of the taking of the testimony raised the point invoked by this court in the instant case in the following or equivalent language, which we quote from the Old Colony case record.

> "Mr. Lambert: The respondent objects to any testimony in this cause for the reason that the issues involved in the case of Old Colony Trust Company vs. The City of Omaha, and the ques-

tions therein involved, have been heretofore definitely adjudicated in favor of the respondent and have been set at rest in the case of the Omaha Electric Light & Power Company vs. The City of Omaha, heretofore tried in the Circuit Court of the United States for the District of Nebraska, and in the same cause appealed to the Circuit Court of Appeals of the Eighth Judicial Circuit, this complainant sustaining a relation of privy to the said Omaha Electric Light & Power Company, and, therefore, bound by the adjudication in said cause.

Second: Because at the time the said cause was pending in the Circuit Court of the United States for the District of Nebraska, and also in the Eighth Judicial Circuit Court of Appeals, complainant in the instant case was fully advised of the issues and questions involved in said litigation, and had failed to appear, or make such appearance therein, and for that reason it is estopped at this time, and in this action, from relitigating questions determined in said cause." (p. 421).

Nor can it be said that the point was not called to the attention of the U. S. Supreme Court. We quote from the brief of the Appellee, City of Omaha, before the Supreme Court:

> "If the appellant herein desired to be in a position to question the reasons which the Circuit Court of Appeals may have given for its affirmance of the decision of the lower court, it should have become a party to that litigation, having had abundant opportunity so to do." (p. 11)

Unquestionably, therefore, the decision in the Old Colony case is a direct adjudication, which we submit is binding upon this court, to the effect that this appellee was not bound to make a showing either, (a) that it did not have notice of the prior suit or could not have intervened therein, or (b) that there was accident, fraud, mistake, or any of the other bases recited by this court as a ground for the injunction, but that it was necessary only for appellee to show, exactly as we contend, that there was a prior judgment in the state court action rendered against its mortgagor in which appellee was not made a party or served.

In *Atchison Ry. Co. v. Wells,* supra, where Wells, a Colorado citizen, had sued the Santa Fe in Texas, had secured a writ of garnishment to a Texas Ry. Company, but was not able to make personal service upon the Santa Fe in Texas, and the Santa Fe received notice by personal service on one of its officers in Kansas of the Texas suit in time to have appeared therein, it was contended that the federal court plaintiff should have entered into the state court action and there asserted its rights. The Supreme Court held the injunction restraining the enforcement of the judgment as being void, was proper, and said:

> "The Santa Fe was not obliged to assert its rights in the courts of Texas. Compare Firestone Tire & Rubber Co. v. Marlboro Cotton Mills, 282 Fed. 811, 814." (pp. 103, 104)

In *Hyde v. Stone*, (1857) 20 How. 170, the court said:

> "But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. In many cases, State laws form a rule of decision for the courts of the United States, and the forms of proceedings in these courts have been assimilated to those of the States, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." (p. 175)

See also

Smyth v. Ames, 169 U. S. 466, 516.

In the *Essanay Film Co. case*, supra, the court pointed out that the party whose rights are affected by the state court decree has three different remedies:

> "Besides a challenge of the jurisdiction of the state court for want of due process over defendant in personam, to be interposed in that court, and, if overruled, followed by invoking the revisory jurisdiction of this court, *the final judgment may be questioned collaterally, if in truth there be a want of due process, either defensively,*

as in Pennoyer v. Neff, 95 U. S. 714, 723-733; see also, York v. Texas, 137 U. S. 15, 20-21; Western Indemnity Co. v. Rupp, 235 U. S. 261, 273; Baker v. Baker, Eccles & Co., 242 U. S. 394, 401-403; or *by adopting the more aggressive method pursued in Simon v. Southern Ry. Co.,* supra; see also Wells Fargo & Co. v. Taylor, 254 U. S. 175, 183-185. In short, observance by the federal courts, towards litigants in the state courts, of the comity prescribed by § 265, requires orderly procedure but involves no impairment of the substance of constitutional right.'" (pp. 361, 362) (Italics ours).

Western Union Telegraph Co. v. Tompa, (C. C. A. 2-1931), 51 Fed. (2d), 1032, was a suit by the Telegraph Company to enjoin Tompa from prosecuting an action in the New York Supreme Court against the New York Central Railroad Co., Tompa having been injured on a railroad car while working for the Telegraph Company on premises of the New York Central Railroad Company, and the Telegraph Company having an agreement to indemnify the Railroad against any claims on account of such injuries, and Tompa having agreed with the Telegraph Company not to sue the Railroad Company on account of any such injuries, but to look to the relief plan of the Telegraph Company or Workmen's Compensation. *The Telegraph Company had notice of the pending suit in the state court.* Though the federal court refused to issue an injunction against the proceedings

in the state court, it did enjoin the plaintiff therein from enforcing any judgment she might obtain. As against the contention that the Telegraph Company should have asserted its rights in the state court, the Circuit Court of Appeals of the Second Circuit said:

> "The prosecution of the defendant's pending suit is in violation of her agreement with the plaintiff, and the plaintiff has no adequate remedy at law. *Even if we assume that the plaintiff has a remedy in an independent action in equity in the state court or, without deciding, by petition to intervene in the now pending suit, such a remedy does not deprive it of the right to seek redress in this action, curtail the power or do away with the duty of a federal court to grant relief within the limits, and to the full extent, of its own jurisdiction.* Simon v. Southern Railway Co., supra; Hyde & Oglesby v. Stone, 20 How. 175, 15 L. Ed. 874." (p. 1034) (Italics ours)

Firestone Tire & Rubber Co. v. Marlboro Cotton Mills, (C. C. A. 4-1922) 282 Fed. 811, certiorari denied 260 U. S. 749, referred to by the Supreme Court in the *Atchison case*, supra, involved a situation directly analagous to the one now under consideration. The Ohio Firestone Company entered into a contract with a South Carolina company, which filed suit for a breach of contract against the Ohio Corporation in a South Carolina State Court and service was made upon an agent of the West Virginia Firestone Company. A default judgment

was entered and action taken to collect the judgment by attachment of accounts belonging to the West Virginia Firestone Company. Both companies brought an action in Federal Court to enjoin the enforcement of this judgment, although they still had an opportunity to obtain relief in the state court. In that case enforcement of the state court judgment was restrained, although it affirmatively appeared that it was still possible for the federal court plaintiffs to set up their rights and seek relief in the state court. In granting the relief, the court said:

> "It follows, therefore, that upon the record now before us we have to decide whether a corporation against whom a void final judgment has been obtained may, where the necessary jurisdictional facts exist, have the enforcement of the same restrained, *and also whether another corporation, whose property is sought to be taken either upon the mistaken theory that a final judgment has been obtained against it, or that by reason of its relationship to another corporation against whom the judgment was obtained,* may, where jurisdictional facts exist, obtain the aid of a federal court to restrain and enjoin, in a proper case, persons so acting from taking its property in satisfaction of such judgment.
>
> "We think both questiosn should be answered in the affirmative. *This was also the conclusion at which the lower court arrived, and its refusal to exercise the authority was solely upon the ground that the state court wherein the judgment*

was obtained might, at any time within a year from the recovery of the judgment, or, where the judgment was attacked on equitable grounds, at any time after a year, grant complete relief. This, we think, was error, for, even though it be conceded that complainants, or either or both of them, might have appeared by petition in the court in which the judgment was obtained and applied to have the judgment set aside upon grounds similar to those contained in the bill filed in the federal court, they were not confined to this relief alone. The necessary diversity of citizenship, and the amount involved, gave them their right to ask relief in the proper federal court, and a federal court, in the exercise of its equity power, may, and should in a proper case, enjoin the collection of a judgment fraudulently or *unlawfully* obtained in a state court." (p. 814) (Italics ours).

The same situation arose in *Ballard & Ballard Company v. Munson Steamship Line,* supra, decided by this court in 1928. Judgment was obtained by default in a state court of Kentucky against the Steamship Line. It was void because the Steamship Line was not doing business in Kentucky and the agents served were not its agents. The Steamship Line learned of the default eleven days after it was taken and under Kentucky law the judgment did not become final for forty-nine days thereafter. Although the Steamship Line made no attempt to go into the state court action and assert its rights,

this court affirmed the issuance of an injunction restraining the state court plaintiff from enforcing the judgment.

We now come to the cases cited by this court for the proposition that appellee is barred from injunctive relief because it has not shown that it did not have notice of the quo warranto suit in time to have appeared therein or could not have intervened therein.

Expressions will be found in these cases to the effect that the party seeking the injunction must have been free from fault or negligence, but this is stated generally. Not one of them denies relief on the ground that mere failure to apply for leave to intervene by one not in privity with the defendant, after extra-judicial notice, constitutes negligence barring relief in equity.

In *National Surety Company v. State Bank,* (C. C. A. 8-1903) 120 Fed. 593, injunctive relief was granted upon the ground of unavoidable accident because the plaintiff (state court defendant), a Missouri corporation, did not get actual notice of process served upon a state officer in Nebraska designated as agent for service of process. The adjudication was, of course, proper under these circumstances, but obviously it was not necessary to the decision to lay down any rule such as this court applies against the appellee in the instant case.

In *Denton v. Baker,* (C. C. A. 9-1899) 93 Fed. 46, the decree of the District Court granting injunctive relief and declaring void a state court judgment against

an insolvent bank was reversed. It there appeared that the receiver of the bank had learned of the judgment a few days after its rendition, but it also affirmatively appeared that the receiver had a definite means for getting rid of that judgment under the state statutes, and that he was guilty of long unsatisfactorily explained delay, amounting to laches, after which he applied to the state court which had rendered the judgment to vacate the same, which was denied, and that on his appeal to the state supreme court the order denying the application to vacate the judgment was affirmed, and hence the federal court would not interfere in his behalf. It is obvious that the receiver was in privity with the insolvent bank, as the language of the state supreme court decision clearly pointed out, and so the federal court rightly determined that the receiver was concluded by the result in the state courts.

In *Brown v. County of Buena Vista,* (1877) 95 U. S. 157, there was a Bill by the County in federal court for relief by injunction against the holder of a judgment procured in a federal court against the County upon county warrants brought on the ground of fraudulent conspiracy in the issuance of the warrants and the securing of payments on the judgment. Relief was denied, not on the ground invoked in the instant case against this appellee, but because it there appeared the federal court plaintiff had been served in the prior case, that its allegations of fraud and conspiracy were not proved, and that it was guilty of laches.

In *Knox County v. Harshman,* (1890) 133 U. S. 152, there was a Bill brought by the County in federal court for injunction against prosecution of a writ of mandamus out of the same court to compel a tax levy for the payment of a judgment obtained by Harshman in a prior suit in federal court upon county bonds. The bill claimed fraud, but the real grounds were falsity of allegations in the prior petition and that the county had no notice. The ground of the decision denying relief was that the first ground could not be proved and that the service upon the county in the first suit was regular and conformed to the statute.

In *Marshall v. Holmes,* (1891) 141 U. S. 589, plaintiff brought a Bill in the state court to enjoin execution of a judgment procured by fraud in which it was alleged the fraud was not discovered until after judgment. Plaintiff got a temporary injunction in the state court and afterward sought to remove the case to the federal court. The removal order was denied by the state court, whereupon the case proceeded to judgment in the state court with the result that the injunction was dissolved and the defendant authorized to execute the prior judgment. The case came before the United States Supreme Court on error to review the order denying removal. The Supreme Court's decree of reversal was, therefore, based upon the proposition that the order denying removal was erroneous, and while the petition did allege that the fraud was not discovered until after judgment, no rule was laid down requiring that the plaintiff must

show that she did not have notice of the prior suit or could not assert her rights therein.

5.

In Any View of the Case, Appellee is Without Fault Because Under the Quo Warranto Statutes it Could Not Have Intervened to Assert its Rights in the Quo Warranto Suit.

At all events, even if the view as interpreted by this court that appellee was bound to make a showing of no fault or negligence is accepted, we submit that the record in the case as it stands satisfies the requirement.

The judgment in the state court proceedings was in quo warranto. The procedure in quo warranto actions is regulated strictly by statute (General Code of Ohio Section 12303-12344), and it is a special type of proceeding by force of statute only. *State Ex Rel v. Columbus Del. & M. Elec. Co.,* (1922) 104 O. S. 120. The sections of the Code governing the procedure in quo warranto are exclusive and the other general sections of the code with reference to actions and proceedings have no application. The quo warranto sections make no provisions by which the appellee could have intervened in the quo warranto suit to obtain any relief therein.

That appellee could not have intervened therein as a matter of right, see *Toledo Traction Light & Power Co. v. Smith,* (1913 District Court, Northern District of Ohio) 205 Fed. 643, 662, where it is said by Judge Killits:

> "We are now to that argument which asserts want of jurisdiction in this court, because a remedy at law, as quo warranto, exists to test the title of plaintiff's directors to the seats they claim. In the first place, the statutes of Ohio do not award an action in quo warranto as a matter of right on demand of a party claiming an interest, but devolve upon either the Governor, Supreme Court, General Assembly, Attorney General, or prosecuting attorney the initiative for such an action when title to a private office is in question. Sections 12,305, 12,306, and 12,307, General Code. It would seem to us that the remedy by quo warranto is therefore not quite complete, where the party interested must appeal to the discretion of some other person or body." (p. 662).

Concededly, if appellee had no standing to go into the quo warranto suit other than a questionable right to appeal to the discretion of the state court (on this point see *Coe v. Armour Fertilizer Works,* supra,) the instant case is not only brought squarely within the rule of the Wells-Fargo and other cases relied upon by this court, but is likewise brought squarely within the proposition enunciated by this very court when it says there must be a showing either that appellee had no notice of the state court proceeding or could not have asserted its right therein.

Moreover, the record affirmatively shows that if there was negligence upon anyone's part, it was upon the part of the City. The supplemental mortgage was

filed for record in the Recorder's Office on June 19, 1925, which was prior to the passage of the ordinance directing the filing of the quo warranto proceedings. Thus, the City knew that the Trustee under the mortgage had a claim to the franchise of the Ohio Electric Power Company, if one existed. *Section* 12310 *Ohio General Code* provides:

> "All persons who claim to be entitled to the same office or franchise may be made defendants in one action, to try their respective rights to such office or franchise."

As the City saw fit to ignore the rights of the Trustee under the mortgage in the quo warranto proceedings, we submit it is not right that the Trustee under the mortgage residing in a distant state should be presumed nevertheless to have learned of the City's action against the Power Company, and now be held to have lost its rights as a result of the proceedings in the quo warranto case. This, we submit, amounts to saying that the City by deliberately omitting to include the Trustee under the mortgage in the quo warranto case, nevertheless obtained the same rights against the Trustee as though the Trustee had been included in those proceedings and had had its day in court therein. This, we submit, cannot properly be held, and we further submit that under such circumstances the burden is not upon the Trustee to allege and prove that it had no knowledge of the pendency of the action against the Power Company. If

this point is to be considered at all, we submit it was the duty of the defendant City in the pending suit in equity to allege and prove that the Trustee under the mortgage had full notice of the proceedings in quo warranto in time to have intervened, and that the City was itself negligent in not making the Trustee a party to the quo warranto proceedings. As we have shown, even if the City had so alleged and proved, this would still under the authorities hereinbefore cited not have afforded the City any defense against the Power Company's rights in equity. But even if these authorities are not to be followed, we nevertheless submit that on the record in this case the Trustee under the mortgage cannot be held to have been at fault.

6.

We Submit That the Decision of This Court in This Case is Contrary Not Only to its Own Prior Decisions, But is Contrary to the Decisions of Other Circuits and to Those of the United States Supreme Court.

What we have said above has already demonstrated this proposition.

For the proposition that the decision of this court in this case conflicts with its own prior decisions see: *Louisville Trust Company v. Cincinnati,* supra; *Ballard & Ballard Co. v. Munson,* supra; *United Sheet & Tin Plate Co. v. Hess,* supra. That it conflicts with the decisions of the courts of other circuits see: *Firestone Tire*

& Rubber Co. v. Marlboro Cotton Mills, supra; *Western Union Telegraph Company v. Tompa,* supra, and that it conflicts with the decisions of the United States Supreme Court, see *Old Colony Trust Co. v. Omaha,* supra; *Atchison Ry. Co. v. Wells,* supra; *Coe v. Armour Fertilizer Works,* supra; *Simon v. Southern Ry. Co.* supra, and *Wells-Fargo & Co. v. Taylor,* supra.

V.

IN THE ALTERNATIVE APPELLEE ASKS THAT THE CASE BE REMANDED WITHOUT DECISION TO PERMIT THE TAKING OF FURTHER TESTIMONY.

Appellee respectfully reiterates its position, as stated above, that upon the record and the authorities this petition for rehearing should be granted.

Without receding from that position, however, appellee submtis that if the view of this court upon consideration of this petition be otherwise, the case should not be remanded with instructions to dismiss the bill, but in the interests of justice, should be remanded with instructions to receive evidence from both parties on the question as to whether appellee has been guilty of any negligence barring relief in equity. The decision of this court as we read it seems to go upon the basis that on the present record, it may properly be presumed that appellee had knowledge of the pendency of the quo warranto proceedings in time to have asked and obtained as a matter of right leave to intervene, and that appellee

was negligent in not intervening and asserting its rights in the quo warranto suit. We believe we have shown that it is not correct to say that the appellee had any right to intervene in the quo warranto suit, and we believe we have shown that it would not have been guilty of negligence in not attempting to intervene, even if it had had knowledge of the pendency of the quo warranto proceedings. In view of the fact, however, that there is no suggestion either in the pleadings or the evidence that the appellee had any knowledge of the quo warranto proceedings prior to the entry of the final judgment in the Supreme Court of Ohio, we respectfully submit that if the court adheres to the decision that such knowledge would constitute negligence, then the only way the true rights of the parties can be ascertained is to require the evidence to be taken on this subject. In order to demonstrate that this will not be a futile proceeding and that if the point had been made in the court below, such evidence could have been produced and that it still can be produced, we have secured affidavits from all of the various officers and counsel of the appellee (trustee), who were in charge of the mortgage trust in its behalf, and copies of these affidavits are included in Appendix B to this petition for rehearing. They show that appellee had no notice of the quo warranto action until the summer of 1929, subsequent to the Supreme Court decision on June 12, 1929.

We recognize that this matter lies within the discretion of the court, but respectfully submit that under all

of the circumstances the suggested procedure is in the interest of justice, and that it is entirely in line with the practice of this court and other Federal Courts. *Columbus Gas & Fuel Co. v. Columbus,* (C. C. A. 6) 55 F. (2) 56; *Panama Mail S. S. Co. v. Vargas,* 281 U. S. 670; *U. S. v. Rio Grande Irrigation Co.,* 184 U. S. 416, *Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins,* 176 U. S. 167; *Wilson v. Spencer,* (C. C. A. 5) 261 F. 357; *Lee v. State Bank & Trust Co.,* (C. C. A. 2) 38 F. (2) 45.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted, and that the decree of the District Court be, upon further consideration, affirmed.

Respectfully submitted,
MILBANK, TWEED, HOPE & WEBB,
TRACY, CHAPMAN & WELLES,
Solicitors for Plaintiff-Appellee.

GEORGE D. WELLES,
EARL F. BOXELL,
Of Counsel.

CERTIFICATE OF COUNSEL

I, George D. Welles, of counsel for the above-named Petitioner, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for delay.

GEORGE D. WELLES.

APPENDIX A

EXCERPTS FROM PLEADINGS IN CASE OF OLD COLONY TRUST COMPANY VS. CITY OF OMAHA

Excerpt from Bill of Complaint of Old Colony Trust Company in the case of *Old Colony Trust Company vs. City of Omaha* reviewed by the United States Supreme Court in 230 U. S. 100.

"Your orator further avers, that on the 29th day of June, 1908, the said Omaha Electric Light & Power Company filed and presented to the Circuit Court of the United States within and for the District of Nebraska, Omaha Division, its bill in equity praying that the City of Omaha, its officers and representatives be enjoined and restrained from enforcing the provisions of the said resolution directing the cutting of the wires aforesaid, a copy of which said bill of complaint is hereto attached and marked Exhibit 'Q' and made a part hereof; that upon the filing of the said bill, a temporary restraining order was issued as prayed in said bill by said court; that thereafter, an answer was filed in said cause, and replication filed thereto; testimony taken and the cause was submitted to the said court; upon consideration whereof, the said court entered a decree in said cause dismissing the said bill for want of equity, upon the

ground that the said Omaha Electric Light & Power Company had no lawful right to use the streets and alleys and public places of the City of Omaha for the purpose of transmitting electricity to be used for power purposes. Thereupon, an appeal was duly prosecuted from said decree to the United States Circuit Court of Appeals for the Eighth Circuit; and the same came duly on to be heard and was submitted to said court; on consideration whereof, said court entered a decree affirming the decree of the Circuit Court aforesaid, upon the ground that the said Omaha Electric Light & Power Company had no lawful right to use the streets, alleys and public places of the City of Omaha for transmitting electricity for any purpose. Thereupon, an appeal was duly prosecuted from said decree of the said Circuit Court of Appeals to the Supreme Court of the United States, which said last mentioned appeal is still pending and undetermined in said court. Your orator further avers that in said bill and in the testimony offered in support thereof, important facts essential to the proper determination of the rights which your orator as trustee as aforesaid acquired from said Omaha Electric Light and Power Company and still possesses as herein shown to the use of the streets, alleys and public places of the City of Omaha, were not set forth or brought to the attention of the Court; that your orator was not a party to said cause and did not directly or indirectly participate in the prosecution thereof; that in the present state of the said litigation it is impossible for your orator to inter-

vene in said cause, or to bring to the attention and knowledge of the court, the facts aforesaid omitted from said last mentioned bill and testimony. And your orator avers that it is necessary for it, in order to protect the rights of the parties whom it represents as herein set forth, to institute and prosecute this, its separate action." (p. 24)

Excerpts from the answer of the City of Omaha to the Bill of Complaint of Old Colony Trust Company in the case of *Old Colony Trust Company vs. City of Omaha* reviewed by the United States Supreme Court in 230 U. S. 100.

"Further answering said bill and more particularly the averments of the 42nd paragraph, defendant admits that on June 29, 1908, said power company presented to this court in this division, a bill in equity against this defendant and its officers, seeking to enjoin the defendant and its officers from enforcing the provisions of said resolution; admits that Exhibit 'Q' is a copy of the complaint filed in said cause; admits that a restraining order was issued as prayed, and that issues were made, tried and submitted, and that this court upon consideration thereof dismissed the bill of said power company for the want of equity, holding that it had no lawful right to use the streets and public places of defendant for the purpose of generating and supplying current in the production of power and heat. Admits that thereafter an appeal was taken of said cause to

the Circuit Court of Appeals for the Eighth District, and that the same was duly presented to that court, and that said court of appeals affirmed the decree of this court upon the ground that said power company had no lawful right to use the streets and public places of defendant in the transmission of electricity for any purpose; admits that an appeal was attempted to be prosecuted from the decision of said Circuit Court to the Supreme Court of the United States, and that such attempted appeal remains undisposed of in that court. Defendant denies that important facts essential to the proper determination of any rights which complainant has as trustee, were not set forth in the pleadings or developed in the trial or considered by the Court in arriving at its judgment. Admits that complainant was not a party in said action and did not participate, so far as defendant knows, in the prosecution of said action. In relation to the averments of said paragraph of said bill, defendant says that all the rights which said power company possessed and all the grounds and reasons which may be urged or claimed in respect to said power company's rights or the rights of complainant to use the streets, alleys and public places in perpetuity or otherwise, were brought forward or urged in said cause; that all such matters were before this court and before the Circuit Court of Appeals, in the appellate proceedings, and every ground and every reason urged by the complainant in this cause were urged upon the attention of the court in said cause, but this court held there upon consideration of the claims of said power

company, that it was not entitled under and by virtue of Ordinance No. 826, to generate and distribute electrical current for other than lighting purposes, and that no act of this defendant or its officials had enlarged the powers and grants under said ordinance or had estopped this defendant from interfering with the continued use of its streets by said company for said purposes. That the Circuit Court of Appeals affirmed the decree of this court, and upon the issues presented, which were the same as the issues presented by this bill, held and decided that the rights which had been given by Ordinance No. 826 had expired by limitation of time, and that said power company was occupying the streets and public places of defendant for the purpose of distributing current for any and all purposes at sufferance, and that said Ordinance No. 826 did not grant to the grantors of said power company and its assigns, the perpetual right to occupy the streets and public places of defendant for the purpose of distributing current for any purpose, and that the officials of defendant were without power and authority to grant to said power company or to any other company or person, a perpetual right to occupy its streets and public places for said purpose; that the judgments and decrees aforesaid have not been reversed or modified and that thereunder said power company is now and ever since the expiration of said Ordinance No. 826 has occupied the streets and public places of defendant at sufferance and at will. That said judgments, orders and decrees are binding precedents upon the rights of

said power company and the rights of complainant company to use the streets and public places of defendant for the purpose of distributing current under said Ordinance No. 826 or otherwise, and announce the law and are binding precedents as to the right, power and authority of the officers of defendant in 1884 to grant to said power company or any other company or person the right, perpetually, to use its streets for said purposes. That said decisions became and are res adjudicata as to all the questions decided in said cause and as to all questions which might have been raised and decided in said cause, and that thereby and on account of said judgments, decrees and orders and the rules of law in relation to said matters therein announced, complainant is estopped from relitigating and retrying the questions tried in said cause or which might have been presented and tried in said cause.

"For its further answer and defense to said bill, this defendant avers that whatever rights which said complainant company may represent or be entitled to assert as between it and said power company, and whatever rights those whom the complainant company may represent, may have as between themselves and said power company because of their respective relations as trustee or as holder of the mortgage and bonds of said power company, yet the same and all the same give to said complainant company and those whom it represents, no rights or claims as to defendant, superior or greater than those of said power company, and that the rules of law, insofar

as it is concerned, and the decisions of the court which are effective and binding on said power company, are equally effective and binding upon complainant company, and that every question relating to the use of the streets and public places of defendant which has been adjudicated in its favor and against said power company, bind with equal force and effectiveness complainant company and those whom it represents, and that complainant company is not entitled again to litigate the questions relating to the rights of said power company to use the streets and alleys of defendant under its claims of authority by said Ordinance No. 826 or the acts of the party in relation to powers granted or supposed to be granted thereby. That complainant in this cause is not seeking to enjoin defendant from interfering with its operation of the plant in question or the operation thereof by those whom it represents, but on the contrary is seeking to interfere with defendant's proceeding against the right of said power company longer to use its streets and public places for said purposes, which claims and asserted rights so to do have all been adjudicated by the judgment and decree of this court and the judgment and decree of said appellate court in favor of this defendant and against said power company." (pp. 139, 140, 141).

APPENDIX B

AFFIDAVITS

No. 6126

UNITED STATES CIRCUIT COURT OF APPEALS
SIXTH CIRCUIT

THE CITY OF NORWALK, OHIO,

Defendant-Appellant,

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

Plaintiff-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

STATE OF NEW YORK, COUNTY OF NEW YORK, ss:

DONALD MACKENZIE, being duly sworn, deposes and says:

1. That on or about June 18, 1929, the Seaboard Bank of The City of New York (hereinafter called the Seaboard Bank) became the successor to The Seaboard National Bank of The City of New York (hereinafter called the Seaboard National Bank).

2. That from and before July 1, 1924, up to January 1, 1926, he was associated with the firm of Masten & Nichols and that from January 1, 1926, to and after September 16, 1929, he was a member of the firm of Masten & Nichols.

3. That said firm was counsel for said Seaboard National Bank or said Seaboard Bank as trustee under the Ohio Electric Power Company Mortgage dated July 1, 1924.

4. That, except for a period of approximately two months commencing August 8, 1924, all matters connected with the administration of said mortgage referred by said trustee to Masten & Nichols were attended to personally by or were disposed of under the supervision of the deponent.

5. That the deponent had no knowledge of any proceeding in the Ohio State Court relative to the right of the Ohio Electric Power Company to exercise its franchise in the City of Norwalk, Ohio, prior to July 1, 1929.

6. That deponent's first knowledge of any such proceeding was obtained from conversations in the latter part of March, 1933.

(Signed) Donald Mackenzie.

Sworn to and subscribed before me
this 3d day of April, 1933.
(Signed) Pearl E. Loeber,
Notary Public, Kings County.
(SEAL)

No. 6126

UNITED STATES CIRCUIT COURT OF APPEALS
SIXTH CIRCUIT

THE CITY OF NORWALK, OHIO,

Defendant-Appellant,

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

Plaintiff-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

STATE OF CONNECTICUT, COUNTY OF FAIRFIELD, ss:

CHARLES D. MAKEPEACE, being duly sworn, deposes and says:

1. That on or about June 18, 1929, The Seaboard Bank of The City of New York (hereinafter called the Seaboard Bank) became the successor to The Seaboard National Bank of The City of New York (hereinafter called the Seaboard National Bank).

2. That from and before July 1, 1924, until September 16, 1929, he was a Vice-President of said Seaboard National Bank or of said Seaboard Bank in charge of the branch at which the Ohio Electric Power Company had its account and transacted its business with the Bank.

3. That deponent had no knowledge of any proceeding in the Ohio State Court relative to the right of the Ohio Electric Power Company to exercise its franchise in the City of Norwalk, Ohio, until inquiry in the matter was made of him by Mr. Charles L. Clune on or about March 29, 1933.

(Signed) Charles D. Makepeace.

Sworn to and subscribed before me
this 7th day of April, 1933.

(Signed) Percy E. Cantrell,
Notary Public.

(SEAL)

No. 6126

UNITED STATES CIRCUIT COURT OF APPEALS SIXTH CIRCUIT

THE CITY OF NORWALK, OHIO,

Defendant-Appellant,

VS.

THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

Plaintiff-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

STATE OF NEW YORK, COUNTY OF NEW YORK, SS:

CHARLES L. CLUNE, being duly sworn, deposes and says:

1. That he is a Second Vice-President of The Chase National Bank of the City of New York, successor by merger to The Equitable Trust Company of New York (hereinafter called the Equitable Trust Company) as trustee under the Ohio Electric Power Company Mortgage dated July 1, 1924.

2. That said mortgage was executed to The Seaboard National Bank of The City of New York (hereinafter called the Seaboard National Bank) as trustee on September 2, 1924.

3. That on or about June 18, 1929, The Seaboard Bank of The City of New York (hereafter called the Seaboard Bank) became the successor to said Seaboard National Bank as trustee under said mortgage.

4. That on or about September 16, 1929, said Equitable Trust Company became the successor by merger to said Seaboard Bank as trustee under said mortgage.

5. That from the time of the execution of said mortgage by said Seaboard National Bank as trustee as aforesaid until said merger of said Seaboard Bank with said Equitable Trust Company the deponent was an officer of said Seaboard National Bank or of said Seaboard Bank employed in the corporate trust department and charged with the administration of matters connected with said mortgage.

6. That prior to July 1, 1929, the deponent had no knowledge of any proceeding in the Ohio State Court relative to the right of the Ohio Electric Power Company to exercise its franchise in the *City of Norwalk, Ohio*.

7. That the deponent's first knowledge of any such proceeding was obtained from conversations during the late summer or autumn of 1929 and in any event not earlier than July 1, 1929.

8. That the first knowledge the deponent ever had of said proceeding was learning that a final judgment had been rendered after appeal in the Ohio State Court and that the question was being considered of the advisability of proceedings in the Federal Court being instituted by the trustee under said mortgage.

9. That the deponent has examined all the files of the corporate trust department of said Seaboard National Bank and said Seaboard Bank which in the opinion of the deponent could contain

any matters relative to the administration of said mortgage or relative to said proceeding and that the earliest instrument in any of said files containing any reference to any such proceeding is a letter dated October 23, 1929, received by the trustee on October 24, 1929.

10. That in the judgment of the deponent the only officers of said Seaboard National Bank or of said Seaboard Bank, in addition to himself, likely to have had knowledge of any matters connected with said mortgage or any of the properties covered thereby or of said Ohio Electric Power Company are the following:

Mr. John A. Burns, the Vice President of said Seaboard National Bank and said Seaboard Bank in charge of the trust department.

Mr. Charles D. Makepeace, the Vice President of said Seaboard National Bank and said Seaboard Bank in charge of the branch at which said Ohio Electric Power Company had its account and transacted its business with the Bank, and

Mr. F. Rogers Parkin, the officer of said Seaboard National Bank and said Seaboard Bank who assisted said Mr. Makepeace in connection with financial transactions of said Ohio Electric Power Company.

(Signed) Charles L. Clune.

Sworn to and subscribed before me
this 3rd day of April, 1933.
(Signed) Charles F. Wright,
Notary Public, New York County.
(SEAL)

No. 6126

UNITED STATES CIRCUIT COURT OF APPEALS
SIXTH CIRCUIT

THE CITY OF NORWALK, OHIO,

Defendant-Appellant,

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

Plaintiff-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

STATE OF NEW YORK, COUNTY OF NEW YORK, ss:

JOHN A. BURNS, being duly sworn, deposes and says:

1. That on or about June 18, 1929, The Seaboard Bank of The City of New York (hereinafter called the Seaboard Bank) became the successor to The Seaboard National Bank of The City of New York (hereinafter called the Seaboard National Bank).

2. That from and before July 1, 1924, until September 16, 1929, he was a Vice-President of said Seaboard National Bank or of said Seaboard Bank in charge of the trust department.

3. That prior to July 1, 1929, the deponent had no knowledge of any proceeding in the Ohio State Court relative to the right of the Ohio Electric Power Company to exercise its franchise in the City of Norwalk, Ohio.

4. That deponent's first knowledge of any such proceeding was obtained from conversations during the late summer or autumn of 1929 and in any event not earlier than said July 1, 1929.

5. That the first knowledge the deponent ever had of said proceeding was learning that a final judgment had been rendered after appeal in the Ohio State Court and that the question was being considered of the advisability of proceedings in the Federal Court being instituted by the trustee under the Ohio Electric Power Company Mortgage dated July 1, 1924.

(Signed) J. A. Burns.

Sworn to and subscribed before me
this 3rd day of April, 1933.
(Signed) Charles F. Wright,
Notary Public, New York County.
(SEAL)

No. 6126

UNITED STATES CIRCUIT COURT OF APPEALS
SIXTH CIRCUIT

THE CITY OF NORWALK, OHIO,

Defendant-Appellant,

VS.

THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

Plaintiff-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

STATE OF NEW YORK, COUNTY OF NEW YORK, ss:

F. ROGERS PARKIN, being duly sworn, deposes and says:

1. That on or about June 18, 1929, The Seaboard Bank of The City of New York (hereinafter called the Seaboard Bank) became the successor to The Seaboard National Bank of The City of New York (hereinafter called the Seaboard National Bank).

2. That from and before July 1, 1924, until September 16, 1929, he was the officer of said Seaboard National Bank or of said Seaboard Bank who assisted Mr. Charles D. Makepeace in connection with financial transactions of the Ohio Electric Power Company.

3. That deponent had no knowledge of any proceeding in the Ohio State Court relative to the right of the Ohio Electric Power Company to exercise its franchise in the City of Norwalk, Ohio, until inquiry in the matter was made of him by Mr. Charles L. Clune on or about March 29, 1933.

(Signed) F. Rogers Parkin.

Sworn to and subscribed before me
this 3rd day of April, 1933.
(Signed) Hugh C. Spence,
Notary Public, Bronx Co., N. Y. County.
(SEAL)

ORDER DENYING PETITION FOR REHEARING

(Filed May 18, 1933)

The petition for rehearing of this cause is hereby denied.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, J. W. MENZIES, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of *The City of Norwalk, Ohio* v. *The Equitable Trust Company of New York, N. Y.* No. 6126, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 8th day of June, A. D. 1933.

J. W. MENZIES,

Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

(SEAL)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4194)